

Hanson v. Shell Oil Co.: A Straw in the Wind?

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The Ninth Circuit has recently handed down a decision in *Hanson v. Shell Oil Co.*¹ which, at first blush, purports to lay down a rather rigid economic rule for the resolution of price-cutting issues under the "attempt to monopolize" portion of section 2 of the Sherman Act.² This article will examine the rationale of *Hanson* and its potential utility as a guideline for analyzing price-cutting that is claimed to constitute an attempt to monopolize. Similar and alternative approaches suggested by recent opinions from the Ninth Circuit and elsewhere also will be discussed with a view toward identifying current trends in this uncertain area of antitrust law.

I. THE PROBLEM

In analyzing the specific intent to monopolize element of attempts to monopolize, the courts have traditionally used three basic approaches, the "legitimate business purpose approach," the "unfairness approach," and the "gestalt approach."³ Professors Areeda and Turner, in a recent law review article⁴ argued that because existing case law had provided only "vague formulations"⁵ of the predatory pricing offense,⁶ a cost/price analysis should be undertaken to test the illegality of pricing practices. They reject the over-simplified "pricing-below-(average) cost" test on the ground that a firm may be legitimately

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1. 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 813 (1977).

2. 15 U.S.C. § 2 (1970). This section states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sherman Act section 2 is hereinafter sometimes referred to as "section 2."

3. The categories are derived from Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121 (1973). Hawk cited the following cases and language to illustrate these categories: *Times/Picayune Publishing Co. v. United States*, 345 U.S. 594, 622 (1953) ("predominantly motivated by legitimate business purposes"); *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 140 (D. Mass. 1959), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961) ("there must be evidence that the person who foresees a fight to the death intends to use or actually does use unfair weapons."); *Case-Swayne Co. v. Sunkist Growers, Inc.*, 369 F.2d 449, 459 (9th Cir. 1966), *rev'd on other grounds*, 389 U.S. 384 (1967) (jury instructed to examine the "whole picture").

4. Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

5. *Id.* at 698.

6. "Predatory pricing" is price manipulation that exceeds legitimate competitive pricing. See text accompanying note 75 *infra*.

loss-minimizing at a price well below average cost.⁷ The authors find the key factor to be marginal cost⁸ and conclude, insofar as it is pertinent here, that: a short-run profit-maximizing (or loss-minimizing) price is lawful even though below average cost;⁹ a price at or above average cost is lawful even though it is not short-run profit-maximizing;¹⁰ pricing at or above short-run marginal—and average variable—cost is lawful even though not loss-minimizing in the short run;¹¹ and unless priced at or above average cost, a price below short-run marginal (or average variable) cost is unlawful.¹² They would not penalize limit pricing—deliberately pricing below a short-run profit-maximization point to deter entry or destroy competition—because the lower price and higher productivity are socially beneficial and because only less efficient competitors will be driven out.¹³

In response, Dr. F.M. Scherer, an economist with the Federal Trade Commission, sharply criticized the Areeda/Turner article.¹⁴ Scherer feels it is “unrealistic and even analytically wrong”¹⁵ to utilize a simple short-run cost analysis and would substitute variables emphasizing long-term policy considerations.¹⁶ He suggests the need for a thorough examination of market structure and entry conditions, the behavior of the monopolist under scrutiny, and the monopolist’s intent.¹⁷ In short, he espouses an overall factual analysis and bluntly concludes that use of the Areeda/Turner test is “likely to reach economically unsound decisions.”¹⁸

Areeda and Turner replied in a second law review article.¹⁹ While conceding a point raised by Scherer concerning the wisdom of tolerating prices below marginal cost but above average cost,²⁰ the authors steadfastly maintain that long-run considerations are “intrinsically

7. A “firm that is selling at a shortrun profit-maximizing (or loss-minimizing) price clearly is not a predator.” Areeda and Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 703 (1975).

8. Because marginal cost is difficult to determine, the authors provide alternative tests in terms of average variable cost. *Id.* at 733.

9. *Id.*

10. *Id.* at 733-34.

11. *Id.* at 734.

12. *Id.*

13. *Id.* at 705.

14. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976).

15. *Id.* at 890.

16. *Id.*

17. *Id.*

18. *Id.*

19. Areeda and Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976).

20. *Id.* at 891. With deference, they propose a modification whereby a price at or above average cost would be presumptively lawful unless it were proven to be substantially below marginal cost. *Id.* at 894.

speculative and indeterminate,"²¹ as illustrated by Scherer's collection of proposed variables. Scherer's response²² maintains that the Areeda/Turner rule is "inconsistent with long-term economic efficiency"²³—his primary concern as a government economist. Although the debate may continue in law review articles, in the courts the excitement over the prospect of finding a panacea in the Areeda/Turner approach is already dying down. The marginal/average variable cost test has been recognized as useful, though far from indispensable.

Under the troublesome "attempt to monopolize" portion of section 2 of the Sherman Act,²⁴ the federal courts have had particular difficulty in resolving claims of so-called "predatory pricing," and the law review analysts²⁵ have fared no better in reaching a consensus on when price cutting is actionable as "predatory." Since attempts, as opposed to actual monopolization, pose such difficulties in antitrust enforcement by the government, the attempt section received little judicial scrutiny until the explosive rise of private treble damage actions in the attempt area two decades ago.

When a price cut is legitimately competitive and thus not proscribed by section 2 is seldom readily apparent, and the courts have been understandably reluctant to risk applying the potent sanctions of the Act to the vigorous competitor whose pricing policies are motivated by instincts of self-preservation rather than exclusionary and monopolistic aspirations. The key to the judicial resolution of this dilemma has been the analysis of the intent accompanying a defendant's price-cut. But it is rare that a businessman appends a declaration of purpose to his latest price listings, and his intracorporate memoranda are seldom susceptible to unequivocal interpretation concerning his motives.²⁶ The evaluation of "predatory intent" thus normally is derived from circumstantial evidence, which carries a strong potential for injustice or abject error.²⁷

21. *Id.* at 897.

22. Scherer, *Some Last Words on Predatory Pricing*, 89 HARV. L. REV. 901 (1976).

23. *Id.* at 903.

24. See note 2 *supra*.

25. See note 3 *supra*, and Blecher, *Attempt to Monopolize Under Section 2 of the Sherman Act: "Dangerous Probability" of Monopolization Within the "Relevant Market"*, 38 GEO. WASH. L. REV. 215 (1969).

26. In *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 484 (10th Cir.), *cert. denied*, 354 U.S. 910 (1957), the plaintiff apparently presented direct evidence of defendant's subjective intent to injure plaintiff. Although the court of appeals noted the existence of that testimony, it affirmed the decision in favor of the defendant.

27. The following cases illustrate how certain factors have been utilized by courts as evidence supporting a finding of specific intent: *Klor's v. Broadway Hale Stores*, 359 U.S. 207 (1959) (conduct); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1952) (market power); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338 (3d Cir. 1975) (conduct as permitting inference of intent and probability of success); *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir.) (direct evidence of coercion), *cert. denied*, 354 U.S. 923 (1957); *W.L. Gore & Assocs., Inc. v. Carlisle Corp.*, 381 F. Supp. 680 (D. Del. 1974) (conduct in which market share merely "sub-

II. HANSON V. SHELL OIL CO.

*Hanson v. Shell Oil Co.*²⁸ involved claims by an independent owner of a service station that Shell and others had violated section 7 of the Clayton Act²⁹ and sections 1³⁰ and 2 of the Sherman Act. The trial court had directed verdicts for Shell on claims of vertical restraint of trade³¹ under Sherman Act section 1 and attempt to monopolize under Sherman Act section 2. Following a jury verdict for Hanson on the claims of a horizontal restraint of trade³² under Sherman Act section 2, the trial court granted a new trial that resulted in a jury verdict for Shell. Hanson appealed the directed verdicts and the grant of a new trial.³³

Between 1952 and 1964 Hanson had acquired, primarily on credit, seventeen service stations in the Tucson area so that "by 1964, Hanson [had] turned just under \$7,000 into seventeen old service stations, one natural gas distributorship, and hundreds of thousands of dollars of debt."³⁴ He consistently lost money, and there was evidence that due to inefficiency and exhaustion of credit, his sales volume was inadequate to support indefinite operation. In 1962 he initiated an attempt to sell his business, which was finally closed out in 1966. In the words of the court: "Like many another loser in the competitive endeavor, he decided to try the antitrust laws as a means of shifting his losses to someone else."³⁵

Hanson claimed that he had been a victim of retail gasoline price wars caused by Shell's (and others') policy of driving private brands and independents out of the market. More specifically, he claimed that Shell had devised a predatory pricing scheme in which its dealers were coerced into cooperation and that Standard and Shell had joined together to ensure that the plan would affect only the independents, and not each other.

The court of appeals affirmed the district court's findings on four grounds. First, Shell's maintaining one or two company-owned stations in Tucson, even if it put pressure on independents to conform to Shell's suggested retail price was not violative of section 1 of the Sher-

stantial"); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953) (market power in which acts not predatory practices), *aff'd per curiam*, 347 U.S. 521 (1954).

28. 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 813 (1977).

29. 15 U.S.C. § 18 (1970).

30. 15 U.S.C. § 1 (1970).

31. A vertical restraint of trade involves levels of distribution. An example is an agreement between a retailer and a manufacturer to sell for at least a stated minimum price.

32. A horizontal restraint of trade involves persons at the same level of the distribution system. An example is an agreement between competing retailers to fix prices.

33. Also asserted on appeal were a statute of limitations error and the erroneous exclusion of survey evidence. 541 F.2d at 1361-62.

34. 541 F.2d at 1355.

35. *Id.*

man Act.³⁶ Second, Shell's "dealer assistance" program whereby Shell lowered its wholesale price when it recommended a lower retail price "was not initiated by Shell to force dealers to fix prices but was initiated by dealers to enable them to stay competitive"³⁷ and was not conditioned on a dealer's *actually* reducing his retail price³⁸—thus, it was not unlawful. Third, there was insufficient evidence of coercion of retail dealers to conform to Shell's pricing policies,³⁹ under the Ninth Circuit's guidelines as promulgated in *Gray v. Shell Oil Co.*⁴⁰ Finally, the court held that there was no causal connection between Shell's pricing policies and Hanson's demise.⁴¹

Hanson based his attempt to monopolize claim on Shell's pricing policy, but apparently his brief was significantly, if not totally, deficient in factual and legal analysis of the section 2 attempt to monopolize issues. One might speculate that the section 2 claim was nothing more than an afterthought in a "blunderbuss" complaint and was never paid serious attention either at trial or on appeal.

The court of appeals first addressed Hanson's threshold failure to define a relevant market. If this opinion had not been written for the Ninth Circuit, the balance of the discussion of predatory pricing and specific intent might be entirely disregarded as dictum, since all other circuits require proof of a relevant market in a section 2 attempt to monopolize claim.⁴² The court then proceeded under the assumption that Shell was being accused of attempting to monopolize the retail market⁴³ by means of its pricing policy and entered upon a specific-intent analysis. After pointing out that Hanson had not even taken the trouble to brief the issue of specific intent, the court found that Hanson had presented *no* evidence of specific intent and concluded that Shell's price cutting was justifiable as merely an attempt to bolster its declining share of the Western Region market.⁴⁴ This conclusion was based on Hanson's failure to prove that Shell's pricing was below its marginal or average variable cost. Such a failure, the court stated, resulted in, as a matter of law, an absence of a *prima facie* case under section 2.⁴⁵

36. *Id.* at 1356.

37. *Id.*

38. *Id.* at 1356-57.

39. *Id.*

40. 469 F.2d 742 (9th Cir. 1972).

41. 541 F.2d at 1360. Judge Wright concurred in the result on the sole ground of lack of causal connection. 541 F.2d at 1363.

42. *E.J. Delaney Corp. v. Bonne Belle, Inc.*, 525 F.2d 296, 305 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) and cases cited therein.

43. The court concluded that any claim of attempted wholesale market monopolization would fail for lack of causality. 541 F.2d at 1360.

44. *Id.* at 1358.

45. *Id.* at 1359.

III. REQUIREMENTS FOR A FINDING OF ATTEMPT TO MONOPOLIZE

The requirements for a finding of attempt to monopolize under section 2 of the Sherman Act were first enunciated by Justice Holmes in *Swift & Co. v. United States*:⁴⁶

Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.⁴⁷

Unfortunately, Holmes introduced ambiguity at the outset, since this passage may be interpreted as requiring intent *and* independent proof of dangerous probability or as requiring *only* intent, which of itself produces a consequent dangerous probability of success. The question is thus raised whether or not the common-law doctrine of “factual impossibility”⁴⁸ applies in attempt to monopolize cases or whether a “mere” intent to monopolize, accompanied by an act directed toward that purpose, is sufficient for a violation of section 2, despite the fact that the actor may not have the ability or power to achieve monopoly status.

The uncertainty of *Swift* is as yet unresolved and widely divergent views have been expressed by the courts. At the one extreme are pronouncements that appear to be based on dictionary definitions rather than law: “An attempt is, as the term indicates, a conative effort to achieve a result. The mere failure to succeed, or the impossibility of success, does not negative an attempt.”⁴⁹ At the other extreme are those decisions that paradoxically hold that to show that a defendant has *attempted* to achieve the goal of monopolization it must first be proven that he has *in fact* achieved that goal. For example, *Car Distributing Co. v. Bay Distributors, Inc.*⁵⁰ contains the remarkable but not isolated conclusion that attempt cases require proof of “a dangerous probability that monopoly power . . . exists.”⁵¹

46. 196 U.S. 375 (1905).

47. *Id.* at 396 (citations omitted).

48. Factual impossibility refers to a situation where a defendant intends to accomplish an act proscribed by the criminal law but is unable to accomplish the act because of circumstances. It is generally not considered a defense to an attempted crime. LAFAYE & SCOTT, CRIMINAL LAW, 440 (1972).

49. *Coleman Motor Co. v. Chrysler Corp.*, 376 F. Supp. 546, 561 (W.D. Pa. 1974), *rev'd*, 525 F.2d 1338 (3d Cir. 1975).

50. 337 F. Supp. 1154 (N.D. Fla. 1971).

51. *Id.* at 1157. See *Rea v. Ford Motor Co.*, 497 F.2d 577, 590 n.28 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974), (dangerous probability requires a showing that defendants had ability to exclude competition); *Kreager v. General Elec. Co.*, 497 F.2d 468, 471 (2d Cir.), *cert. denied*, 419 U.S. 861 (1974), (section 2 requires monopoly power, intent, and dangerous probability);

A. *Dangerous Probability and Relevant Market*

The debate over the meaning of the "dangerous probability" requirement has for the most part centered about the issue of whether plaintiff must prove a relevant market as a prerequisite to a showing that the defendant's exclusionary potential is dangerously close to actual monopolization. In *Lessig v. Tidewater Oil Co.*⁵² the Court of Appeals for the Ninth Circuit stated broadly that "[w]hen the charge is attempt . . . to monopolize, rather than monopolization, the relevant market is 'not in issue.'"⁵³ Though there is dictum to the contrary in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*,⁵⁴ the Ninth Circuit has recently affirmed the narrower meaning of *Lessig* that relevant market need not always be proven in attempt cases.⁵⁵

Lessig has been criticized for its suggestion that only intent, and not relevant market, was in issue,⁵⁶ and its holding was narrowed by a subsequent decision of the Ninth Circuit.⁵⁷ Recently, it appears that the Ninth Circuit is clinging to the notion that "evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made."⁵⁸ In other words, if a plaintiff can prove a section 1 claim, the specific intent and dangerous probability requirements of the section 2 attempt clause may be inferred without proof of relevant market. If he cannot make out a section 1 violation he

Bernhard Food Indus., Inc. v. Dietene Co., 415 F.2d 1279, 1284 (7th Cir. 1969), *cert. denied*, 397 U.S. 912 (1970), (attempt requires showing of monopoly power). These utterly illogical pronouncements trace back to language from *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), which did not involve an attempt claim: "In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize." *Id.* at 432.

52. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

53. *Id.* at 474.

54. 382 U.S. 172 (1965). The relevant language from *Walker Process* is as follows: "To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved." *Id.* at 177. Since *Walker Process* arose only on the pleadings, concededly unclear according to the Court, and since the only mention in the opinion of the word "attempt" is in the above quoted passage, *Walker Process* arguably refers only to the completed offense. Contrast dictum from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1939): "The existence or exertion of power to accomplish the desired objective . . . becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of § 2 of the Act." *Id.* at 226 n.59 (citations omitted). The *Socony* Court went on to suggest it was distinguishing section 1 from section 2, not conspiracy and attempt from actual monopolization; however, the carelessness of the draftsmanship is striking.

55. *Greyhound Computer, Inc. v. IBM*, 559 F.2d 488 (9th Cir. 1977). *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2977 (1977).

56. See, e.g., *Agrashell, Inc. v. Hammons Prods. Co.*, 479 F.2d 269, 287 (8th Cir.), *cert. denied*, 414 U.S. 1032 (1973); *Diamond Int'l Corp. v. Walterhoefer*, 289 F. Supp. 550, 575 (D. Md. 1968); *Becker v. Safelite Glass Corp.*, 244 F. Supp. 625, 637 (D. Kansas 1965).

57. *Bushie v. Stenocord Corp.*, 460 F.2d 116, 121 (9th Cir. 1972). But see *Greyhound Computer, Inc. v. IBM*, 559 F.2d 488 (9th Cir. 1977).

58. *Hallmark Indus. v. Reynolds Metals Co.*, 489 F.2d 8, 12-13 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

must demonstrate the defendant's market power in support of *other* evidence of specific intent and dangerous probability. The vast majority of the decisions in the other circuits view specific intent and dangerous probability as completely separate issues and require proof of relevant market in all section 2 attempt cases.⁵⁹

B. *Proving Specific Intent*

The enormous difficulty in proving that a defendant actually intended to achieve monopoly power was implicitly recognized by Judge Hand in his famous opinion in *United States v. Aluminum Co. of America*.⁶⁰ In this section 2 monopolization case against a defendant that controlled ninety percent of the aluminum market, the parties had piled up a "fabulous record"⁶¹ on the issue of intent. Rather than examine the evidence of "specific intent," which proved that acts "neutral on their face, were not in fact necessary to the development of 'Alcoa's' business,"⁶² Judge Hand decided that "the issue of intent ceases to have any importance"⁶³ in a monopolization case. Where monopolization rather than attempted monopolization was the charge, only an "intent to bring about the forbidden act"⁶⁴ was required, since "no monopolist monopolizes unconscious of what he is doing."⁶⁵

The courts have recognized that businessmen do not often accompany exclusionary practices with succinct verbalization of their motives.⁶⁶ Thus, they have been compelled to draw inferences of specific intent to monopolize from certain "unfair"⁶⁷ business practices occurring under particular circumstances. It is axiomatic that the more blatantly "unfair" the practice, the stronger the inference of intent. Likewise, the greater the power of the defendant in a particular market, the easier it is to draw the inference that by his acts he intends to monopolize that market—for just as the monopolist is constrained from practices open to the ordinary businessman,⁶⁸ so is the near-monopolist forbidden to engage in acts available to the competitor who lacks any significant degree of market power. Logically, then, the courts and juries should consider the following factors in determining the issue

59. See note 42 *supra* and accompanying text.

60. 148 F.2d 416 (2d Cir. 1945).

61. *Id.* at 432.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See note 26 *supra*.

67. See note 27 *supra*.

68. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

of specific intent: (1) the "directness" of the evidence;⁶⁹ (2) the degree of "unfairness" of the conduct; and (3) the market power of the defendant.

The Ninth Circuit has obliquely recognized these factors in *Hallmark Industry v. Reynolds Metals, Co.*⁷⁰ "Ordinarily specific intent is difficult to prove and will be inferred from such anticompetitive conduct. Therefore, evidence of market power may be relevant, but it is not indispensable where a substantial claim of restraint of trade is made."⁷¹ The passage implies that the best evidence of specific intent is direct evidence, which ordinarily is unavailable. Absent direct evidence an inference of specific intent may be drawn from predatory conduct. Such an inference may be supported by proof of market power in a relevant market.

Elsewhere, the same three factors would appear to be fully applicable, even though the circuits other than the Ninth Circuit discuss market power under the heading of "dangerous probability" rather than "specific intent."⁷² Outside of the Ninth Circuit failure to prove market power will defeat an attempt claim;⁷³ if market power is proven it will have further relevance on the issue of intent.⁷⁴

IV. PREDATORY PRICING

The courts are compelled to draw inferences of intent from "unfair" business practices, but the task of delineating what is an "unfair" practice has proved difficult. Of the "unfair" practices considered to be evidence of specific intent to monopolize, "predatory pricing" has perhaps proved the most troublesome. The term "predatory," while metaphorically evocative, is confusing and unnecessary—it carries with it a connotation of killer instinct that goes beyond what it is actually meant to describe. "Predatory pricing" merely signifies a lowering of price that somehow passes beyond legitimate competitive pricing.⁷⁵ Price cutting is unlawful only when used as an "instrument of monopoly

69. The authors use "directness" in a loose sense. Direct evidence is provided by words (*i.e.*, memoranda, conversation at meetings, threats, etc.). Indirect evidence consists of mere acts. Both direct and indirect evidence, in this sense, of specific intent, are almost always circumstantial.

70. 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974).

71. *Id.* at 12-13.

72. *See, e.g.*, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974).

73. *See* note 42 *supra*.

74. "To be successful, an attempt case must establish both an intent to monopolize and a dangerous probability of successful monopolization; these elements take on meaning only with reference to an actual or potential exercise of power, which in turn must be assessed in the context of a relevant market." *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974) (citations omitted).

75. "But price cutting without more is not a violation of the Sherman Act." *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 120 (1948).

power to eliminate competitors or to bring them to their knees."⁷⁶ Thus, additional "facts and circumstances"⁷⁷ must be proved to show that the purpose of the price cutting was to achieve monopoly power. The problem, of course, is to determine exactly what "facts and circumstances" must accompany price cutting in order to evince specific intent to monopolize. How does one differentiate between a "mere" price war and a bona fide attempt to drive out all competition?

A. Ninth Circuit View

*Hanson v. Shell Oil Co.*⁷⁸ suggested that the test is economic. The court indicated two means by which the plaintiff could demonstrate that Shell's pricing was predatory: (1) by showing it was below marginal or average variable cost;⁷⁹ or (2) by proving it "was below its short run profit-maximizing price and that barriers to entry were great enough to prevent other entry before the predator could reap the benefits of his oligopolistic or monopolistic market position."⁸⁰ The *Hanson* court, though, had "some question"⁸¹ whether the second alternative was legally viable. It is noteworthy that these two alternatives were not necessarily meant to be the exclusive means of proving predation, for the court indicated that predation and specific intent "could,"⁸² not "must," be shown in such a manner.

Thus, while *Hanson* might be read as setting down an inflexible rule that price-cutting is not evidence of specific intent to monopolize absent a showing of pricing below marginal or average variable cost, the opinion must be considered in the context of the lack of evidence presented by the plaintiff. First, he failed to submit proof as to Shell's relevant market share. As stated earlier, outside the Ninth Circuit this would automatically foreclose any claim under section 2.⁸³ Even under the Ninth Circuit approach to section 2 attempt cases, plaintiff's failure to prove relevant market, coupled with his failure to demonstrate a restraint of trade under section 1, would bar further inquiry into the possibility of a section 2 violation.⁸⁴ Thus, unless the *Hanson* court meant to re-adopt the disfavored literal language of *Lessig v. Tidewater Oil Co.*⁸⁵ the entire discussion of specific intent and predatory pricing is superfluous.

76. *Id.* While *Schine* was a monopolization case, the language quoted is fully applicable to attempt cases.

77. *Id.*

78. 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 813 (1977).

79. *Id.* at 1358.

80. *Id.* at 1358 n.5.

81. *Id.*

82. *Id.* at 1358.

83. See note 9 *supra* and accompanying text.

84. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975).

85. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). See notes 52-56 *supra* and accompanying text.

Furthermore, the plaintiff presented no probative evidence, other than the mere act of price-cutting, that Shell had any exclusionary intent. There was direct evidence that a Shell dealer was told his lease would be cancelled "if I didn't do as I was told."⁸⁶ This evidence, however, was presented totally out of context, and no attempt was made to relate it to Shell's general pricing policy.⁸⁷ There was also some testimony to the effect that a Shell representative told a dealer that by following Shell's price suggestions, they would enter a "period of better cooperation."⁸⁸ Finally, Shell's "dealer assistance" program was found to be one in which the dealers, not Shell, suggested price reductions.⁸⁹

Thus, Hanson presented trivial and unpersuasive direct evidence of intent. He failed to prove market share, from which intent might have been inferred. He also failed to prove activity that would be unlawful under section 1. Therefore, to prove intent, Hanson could rely only on the nature of Shell's pricing policy itself. In this case then, where there was no other evidence of specific intent, the court suggests that only by using the Areeda/Turner approach⁹⁰ could the pricing be shown predatory.

While the *Hanson* court suggested that the plaintiff might have made out a prima facie case had he shown that Shell had priced below marginal or average variable cost, it continued in a footnote to propose, with considerable reservations, an alternative possibility, "limit pricing,"⁹¹ i.e., sacrifice of maximum short-run profits for the purpose of securing long-run monopoly profits. Since limit pricing is on its face less "unfair" than below-cost pricing, the court suggests that taken alone, it does not raise an inference of intent. However, when accompanied by proof of barriers to entry—which would allow a successful "predator" to reap his monopoly profits for a time at least—an inference of intent may be derived.

The final footnote in this section of *Hanson* purports to lay down

86. 541 F.2d at 1357.

87. *Id.*

88. *Id.*

89. *Id.*

90. See notes 4-13 *supra* and accompanying text.

91. The court expressed this possibility as follows:

An alternative possibility might be a showing that the defendant charged a price which, although above marginal or average variable cost, was below its short run profit-maximizing price and that barriers to entry were great enough to prevent other entry before the predator could reap the benefits of his oligopolistic or monopolistic market position. See *International Air Industries, Inc. v. American Excelsior Co.*, (5th Cir. 1975), 517 F.2d 714, 724. There is some question, however, whether pricing below a profit maximizing point which is still above marginal and average variable costs should be considered predatory; it only discourages inefficient new entrants who must have higher prices to survive. See Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 704-09.

541 F.2d at 1358 n.5.

a rule of law by which no plaintiff could ever make a prima facie showing of attempt to monopolize unless he could prove that the defendant was pricing below cost.

While proof of pricing below marginal average variable cost is pre-requisite to a prima facie showing of an attempt to monopolize, such a showing, if made, would not show a *per se* violation. There may be non-predatory and acceptable business reasons for a firm engaging in such pricing. Plaintiff's showing of below-cost pricing merely clears the first hurdle and raises the question of justification.⁹²

Such a rule is totally irreconcilable with such United States Supreme Court decisions as *Otter Tail Power Co. v. United States*,⁹³ *Lorain Journal Co. v. United States*,⁹⁴ and *United States v. Griffith*,⁹⁵ in each of which there was no issue of below-cost pricing. If the footnote can make any sense at all, it must be understood to be limited to the facts of Hanson's case, which presented no other evidence of specific intent to monopolize.

Lest there be any doubt that *Hanson* does not require a cost/price accounting analysis in every section 2 attempt case, clarification is available in the subsequent Ninth Circuit decision of *Knutson v. Daily Review, Inc.*⁹⁶ In that case plaintiff newspaper distributors charged defendant newspapers with a panoply of Sherman Act violations including resale price maintenance, territorial restraints, and refusal to deal under section 1 and an attempt to monopolize "the newspaper trade"⁹⁷ under section 2. The trial court had found for plaintiffs on the price-fixing count, but for the defendants on the other counts.

Judge Hufstedler stressed that in considering the attempt to monopolize claim, the court was bound to follow the Ninth Circuit rule as developed in *Lessig v. Tidewater Oil Co.*⁹⁸ and a line of cases through *Hallmark Industries v. Reynolds Metals Co.*⁹⁹ This rule was expressed as follows: "In sum, we require (1) only specific intent and (2) some illegal (under Section 1) or predatory activity from which specific intent can be inferred. Where the conduct is justified by legitimate business reasons or merely exemplifies a healthy spirit of competition, an intent to monopolize is more difficult to support."¹⁰⁰

92. *Id.* at 1359 n.6.

93. 417 U.S. 901 (1974).

94. 342 U.S. 143 (1951).

95. 334 U.S. 100 (1948).

96. 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 97 S.Ct. 2977 (1977).

97. *Id.* at 800.

98. 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). See notes 52-56 *supra* and accompanying text.

99. 489 F.2d 8 (9th Cir. 1973). See text accompanying note 58 *supra*.

100. 548 F.2d at 814. This passage was based on the premise that "[t]he sole issue, then, in this attempt case, is the presence or absence of a 'specific intent to destroy competition or build monopoly.'" *Id.* at 814 (emphasis added). *Contra*, *Jack Winter, Inc. v. Koratron Co.*,

In reviewing the evidence, the court determined that (1) the section 1 price-fixing violation constituted "knowingly unlawful"¹⁰¹ activity but did not require an inference of specific intent, (2) defendant "Sparks'" history of purchasing competitors for prices greatly out of proportion to the value of their assets provided support for, but did not compel, an inference of specific intent,¹⁰² and (3) "questionable promotional practices" and the "padding of circulation figures" were a "neutral element in the search for the requisite specific intent."¹⁰³ In a footnote, the court suggested repudiation of the Areeda/Turner analysis,¹⁰⁴ and a clarification of *Hanson*, though it cited neither:

Moreover, the specific offense of maximum resale price fixing could be used to destroy (or exclude) competition or build a monopoly. If the fixed maximum price is higher than cost but lower than a price that would permit new entrants or smaller scale competitors to operate (*i.e.* a "limit price"), then, although not predatory, it could support other efforts to acquire a monopoly.¹⁰⁵

Significantly, the *Knutson* plaintiffs had failed properly to define the relevant market or the market power of the defendant, and there was no evidence of direct communication to independents that their lack of conformance to suggested prices would result in termination. Like *Hanson*, *Knutson* failed to provide evidence of market power or direct evidence of specific intent.¹⁰⁶ Yet the court concluded that the trial judge might have drawn the inference of specific intent from the section 1 violation alone or in combination with other evidence, though his failure to do so was not "clearly erroneous."¹⁰⁷ The court's careful review of the evidence of unlawful and unfair activity, however, does much to dispel the notion that a decision on attempt to monopolize must be based solely on hard accounting evidence. It suggested, on the other hand, that limit pricing is not as predatory as is below-cost pricing, but may be probative circumstantial evidence of specific intent when accompanied by other evidence.¹⁰⁸

B. *Decisions in Other Circuits*

The *Knutson* approach has received substantial support from a

375 F. Supp. 1, 70 (N.D. Cal. 1974) ("The requirement of this circuit is something more than specific intent.").

101. 548 F.2d at 814.

102. *Id.* at 815.

103. *Id.* The court stressed that though it discussed each form of conduct separately, "all of the acts should be viewed together in determining whether there was an attempt to monopolize." *Id.* at 815.

104. See notes 4-13 *supra* and accompanying text.

105. 548 F.2d at 814 n.21.

106. *Id.* at 815.

107. See section III.B.

108. 548 F.2d at 814.

recent Eighth Circuit decision, *United States v. Empire Gas Corp.*¹⁰⁹ This case included a claim that defendant had attempted to monopolize the retail sale of liquified petroleum gas. The court stressed its obligation not to tightly compartmentalize¹¹⁰ evidence of specific intent, which was proved by evidence of "market allocation agreements, acquisitions of competitors and covenants not to compete, among other things."¹¹¹ Yet the most persuasive evidence was found to be the defendant's pricing practices, which involved threats by Empire's officers that competitors should raise prices and stop soliciting its customers or be put out of business, coupled with dramatic and immediate price cuts by Empire when competitors refused to capitulate. The government elicited some direct testimony that was particularly inflammatory on the issue of specific intent—such gems as "we have you right where we want you"¹¹² and a threat to play "burnout" with competitors who refused to raise their prices.¹¹³ The district court's conclusion that Empire's price cutting was innocently competitive was rejected as "clearly erroneous."¹¹⁴ Though there was no direct evidence that Empire priced below cost,¹¹⁵ there was evidence of deliberate pricing to the point at which competitors could not make a sufficient profit. The Eighth Circuit held that "an attempt to control price, competition or both demonstrates specific intent to monopolize."¹¹⁶ Though the government had in fact proved both, the district court result was affirmed due to the plaintiff's failure to prove "dangerous probability" of success.¹¹⁷

The Tenth Circuit, which had considered predatory pricing in *Telex Corp. v. IBM Corp.*¹¹⁸ recently had the opportunity to reappraise price-cutting under the novel circumstances in *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*¹¹⁹ The two parties were the lone survivors in the manufacture of an aerospace chemical, the price of which was unresponsive to demand. The industry was plagued by overcapacity and plummeting prices due to changes in U.S. defense

109. 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 97 S.Ct. 1326 (1977).

110. *Id.* at 299. The court cited *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679 (8th Cir. 1966). The language is ultimately derived from *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962): "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Id.* at 699.

111. 537 F.2d at 299.

112. *Id.* at 300.

113. *Id.*

114. *Id.* at 301.

115. Empire used subsidiaries for price cutting in particular areas and an employee had stated that "Empire was large enough that some subsidiaries could carry others." *Id.* at 300.

116. *Id.* at 302.

117. *Id.* at 308.

118. 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

119. 551 F.2d 790 (10th Cir. 1977).

policy and “whipsaw”¹²⁰ pricing, which was provoked by unscrupulous contractors. The court of appeals felt that the industry was ripe for a natural monopoly and concluded that the more diversified, better capitalized defendant’s (hereinafter referred to as “AMPOT”) price-cuts were not predatory.¹²¹ AMPOT’s market share was fifty-three percent when the allegedly illegal behavior began and jumped to eighty percent within a year; yet the weight of this evidence of market power was diminished in view of the concentrated buying power of the government contractors.¹²² However, AMPOT knew that its continued low pricing would ultimately mean the demise of the plaintiff (hereinafter referred to as “PE”) and maintained an extensive industrial espionage system over its weaker rival. AMPOT’s pricing behavior paralleled its assessment of PE’s prospects of survival. There was evidence that AMPOT had made an offer to a PE customer to “dump” a “phony” surplus of the chemical.¹²³ AMPOT had lobbied against PE’s reclassification as a small business,¹²⁴ and AMPOT’s market projections were based on an assumption of the demise of virtually all competition. Credible defenses to these intimations of specific intent were presented, but the trial judge found that the price-cutting, coupled with these “additional facts and circumstances,” warranted a verdict against AMPOT for monopolization and attempt to monopolize under section 2 of the Sherman Act.¹²⁵

The court of appeals reversed, deciding in the defendant’s favor “the fundamental issue [of] whether AMPOT engaged in predatory price cutting.”¹²⁶ Relying heavily on *Union Leader Corp. v. Newspapers of New England, Inc.*¹²⁷ it determined that the acts, other than price-cutting, were lawful in that “[t]hey were merely auxiliaries to its general pricing policy and indicate nothing more than an intent that its pricing succeed in excluding PE from the market.”¹²⁸ A review of the

120. “Whipsaw” is a slang word for the procedure of taking payments from both sides in a contest to influence a vote. The trial judge used the term to describe the practice of the major consumers of the aerospace chemical “who would request quotes on which the . . . contract would supposedly be let.” *Id.* at 792. Instead of letting the contract on that quote, the consumer would tell the two low bidders to “sharpen their pencils,” which would often result “in getting the low bidder to underbid itself.” *Id.* at 792.

121. *Id.* at 798.

122. Three contractors accounted for 55% of the total sales of the chemical. A single supply contract sufficed from months to years. In addition, plaintiff and defendant had sufficient capacity to produce the entire national supply of the chemical. Thus, wide fluctuations in market share were possible merely on the basis of bids to these three buyers. *Id.* at 792.

123. *Id.* at 793.

124. *Id.* The trial court, presumably constrained by the opinion in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) concluded that this was only “symbolic” of AMPOT’s intent. 551 F.2d at 794.

125. AMPOT was also found to have price discriminated in violation of section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13a (1970). 551 F.2d at 791.

126. 551 F.2d at 791.

127. 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

128. 551 F.2d at 795.

evidence in AMPOT's pricing behavior revealed that AMPOT's prices were "well below its average total cost"¹²⁹ but above its average variable cost. In fact, "during the period of alleged predation, prices actually became somewhat higher than they had been."¹³⁰

To determine whether the pricing was predatory, the court, at the outset, criticized the "reasonability"¹³¹ test of price changes: "Although this statement points to the correct result in this case, it still leaves something to be desired. There is no indication of when downward price changes cease to be 'reasonable.'"¹³² The court then went on to examine the Areeda/Turner marginal and average variable cost formula and Scherer's broader approach, which includes consideration of long-run factors and subjective intent.¹³³ It found that AMPOT's prices were always above its marginal costs, low prices persisted into the long-run, and this was not a case of "limit pricing," or sacrifice of maximum short-run profits for the purpose of securing long-run monopoly benefits.¹³⁴ The Areeda/Turner rule was described as "extremely beneficial"¹³⁵ in examining pricing practices, but the court expressly disavowed any intent to adopt a "solely cost-based test."¹³⁶

Since the court dismissed AMPOT's market share almost out-of-hand and refused to consider the cumulative effect of the evidence,¹³⁷ other than pricing, on specific intent to monopolize, one might speculate that it had indeed used a "solely cost-based test."¹³⁸ The court's awkward struggle for some sort of concrete test illustrates the pervasive tension in the federal courts, which are so uncomfortable with the uncertainty inherent in the "unfairness approach,"¹³⁹ but so reluctant to adopt such absolute standards as those proposed by Professors Areeda and Turner.

At any rate, the holding has limited impact since this industry was in such poor shape that its "problems were resolved only by the im-

129. *Id.* at 792.

130. *Id.* at 795.

131. Section 2 does not "prohibit price changes which are within a 'reasonable' range, up or down." The Tenth Circuit's "reasonability" standard was promulgated in *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 927 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). In *Telex*, defendant was found to have a relevant market share well below monopoly level and to have maintained approximately a 20% profit margin despite price cuts. The case's applicability to situations in which market share is high and profit margin low (or negative) is consequently quite dubious. See, e.g., the Ninth Circuit's discussion of IBM's monopoly power in *Greyhound Computer Corp., Inc. v. IBM*, 559 F.2d 488 (9th Cir. 1977).

132. 551 F.2d at 797.

133. See note 4-13 *supra* and accompanying text.

134. 551 F.2d at 797.

135. *Id.*

136. *Id.*

137. *Id.* at 795.

138. *Id.* at 797.

139. See text accompanying note 3 *supra*.

sition of external controls in the interest of national defense.”¹⁴⁰ And, indeed, as the court of appeals observed, had AMPOT “employed price leadership to raise the price to a profitable level for both competitors”¹⁴¹ it might have run afoul of the antitrust laws at the other extreme. Thus, faced with the reality of the trial court’s opinion that “the only way AMPOT could have avoided violating the antitrust laws was to raise prices to a noncompetitive level in order to save its smaller, undercapitalized rival,”¹⁴² the Tenth Circuit may well have had a “definite and firm conviction that a mistake had been made”¹⁴³ by the court below.

In *International Air Industries, Inc. v. American Excelsior Co.*,¹⁴⁴ the Fifth Circuit discussed predatory pricing and specific intent to monopolize in the context of a price discrimination claim under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.¹⁴⁵ The court embarked upon a lengthy economic analysis of “predatory intent” in examining plaintiff’s contention that it was entitled to a directed verdict and, borrowing in part from the Areeda/Turner article,¹⁴⁶ and in part from *Utah Pie Co. v. Continental Baking Co.*,¹⁴⁷ applied the following test:

In short, in order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.¹⁴⁸

The court then found that defendant was selling at a price well above its average variable cost and that “barriers to entry in the cooler pad market were virtually non-existent.”¹⁴⁹

This case can perhaps be viewed as a Robinson-Patman Act counterpart¹⁵⁰ to *Hanson*. The court felt that direct evidence of predation had been quoted out of context. And while relevant market had been proven, defendant’s power in that market was insubstantial. Thus, a

140. 551 F.2d at 797.

141. *Id.* at 796.

142. *Id.* at 795.

143. *Id.* at 798.

144. 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

145. 15 U.S.C. § 13(a) (1970). An attempt to monopolize claim was also filed under section 2 of the Sherman Act; this claim received but minimal treatment in the court of appeals opinion, which characterized as (at most) harmless error the omissions of certain direct and indirect evidence of specific intent. 517 F.2d at 729.

146. *See* note 4 *supra*.

147. 386 U.S. 685 (1967).

148. 517 F.2d at 724.

149. *Id.* at 725.

150. Indeed, the bulk of the court’s analysis of specific intent would be fully applicable to an attempt to monopolize discussion.

directed verdict could be based only on proof of pricing below average variable cost.¹⁵¹ As in *Hanson*, the Areeda/Turner approach was utilized as an alternative when other elements of plaintiff's proof of specific intent had failed.

V. CONCLUSION

At most, the following "rules" may be extracted from *Hanson v. Shell Oil Co.*: (1) price-cutting, standing alone, is insufficient for a finding of specific intent; (2) price-cutting, shown to be below marginal or average variable cost, is prima facie evidence of specific intent; (3) limit-pricing, below a profit-maximization point, coupled with evidence of barriers to entry that would make exclusionary practices profitable, may raise an inference of specific intent. The case clearly cannot stand for the proposition that proof of below-cost pricing must be shown in *all* section 2 attempt cases.

The Ninth Circuit's recent decision in *Knutson v. Daily Review, Inc.* suggested that: (1) limit pricing *alone* does not raise the inference of specific intent; (2) limit pricing, coupled with *other* evidence may raise an inference of specific intent; (3) a section 1 violation may, but does not necessarily, raise an inference of specific intent. *Knutson's* significance in comparison with *Hanson* is thus two-fold. It suggests that the courts are to consider as a whole all of the evidence of specific intent and should not bar a section 2 claim merely because of failure to meet the standards of rigid accounting formula. It also clarifies Judge Duniway's doubts in *Hanson* concerning the "question . . . whether pricing below a profit maximizing point which is still above marginal and average variable costs should be considered predatory."¹⁵² Such limit pricing, while concededly not predatory could, according to *Knutson*, "support other efforts to acquire a monopoly."¹⁵³

The cases from the other circuits support the notion that traditional methods of analyzing "predatory intent" have not as yet fallen prey to the absolute economic test proposed by Professors Areeda and Turner. *United States v. Empire Gas Corp.* in particular, relied upon a common-sense examination of all of the evidence, direct and indirect, on specific intent. *International Air Industries v. American Excelsior Co.* likewise examined all of the evidence, which it found to be insufficient for a plaintiff's directed verdict, while considering the Areeda/Turner model as a possible alternative. *Pacific Engineering & Production Co. v. Kerr-McGee Corp.* faced with an anomalous potential section 2 situation, relied heavily on economic analysis, but was careful to

151. 517 F.2d at 725.

152. 541 F.2d at 1358 n.5. See text accompanying note 90 *supra*.

153. 548 F.2d at 814 n.21.

point out that it was not adopting a "solely cost-based test."¹⁵⁴ Significantly, none of these opinions has gone so far as to literally adopt the tenets of Professors Areeda and Turner, and none has ruled out the use of proof of limit-pricing as a means of demonstrating specific intent. Likewise, none of these cases has considered the use of an economic rule for analysis of price-cuts in the classic monopoly situation, where, it must be conceded, proof requirements in the area of specific intent are much less stringent.

Thus, *Knutson* in the Ninth Circuit, and other recent cases decided elsewhere, support the following conclusion: that *Hanson* did not hold that pricing below average variable cost must be shown at the outset in a price-cutting type of attempt case, but rather suggested that when evidence of specific intent (other than of pricing) is weak or non-existent, a plaintiff may use an economic analysis of the defendant's pricing practices to salvage an otherwise unsupportable case. Indeed, the utility of such a cost/price analysis is not to be denied—proof of below-cost pricing, where available, and where not otherwise justifiable, may be conclusive evidence of monopolistic intent. Yet modern accounting methods do not often permit such precise analysis, especially in multi-line industries dealing in nonstandardized commodities. Furthermore, accountants are rivaled only by lawyers and bookmakers in their ability to manipulate the tools of their trade in order to satisfy the frequently antipodal wishes of their various clients. To subject section 2 of the Sherman Act to a compulsory cost/price accounting analysis in every instance would be effectively to rule it out of existence. Fortunately, while some trial balloons have been sent up, it appears that the courts may already be recognizing the "average variable cost" test as no more than a passing fad.

154. 551 F.2d at 797.

